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THE PUBLIC NATURE OF PRIVATE LAW?*

¿LA NATURALEZA PÚBLICA DEL DERECHO PRIVADO?

CLAUDIO MICHELON**

Abstract:

In this paper the author challenges the liberal vision of the private sphere as a realm of in which agents are justified in acting without taking into consideration anyone else's interests. The private realm cannot be thought in isolation of public law, which should in turn be conceived as an embodiment of the mutual interest of the members of that group in the flourishing of one another.

Key words: *Private Law; Private Sphere; Recognition*

Resumen:

En este artículo el autor discute la perspectiva liberal de la esfera privada como un ámbito en el cual se justifica que los agentes actúen sin tomar en cuenta los intereses de los demás. El ámbito de lo privado no puede concebirse aisladamente del derecho público, el que a su vez debe ser concebido como la encarnación del interés mutuo de los miembros de la comunidad en el florecimiento de cada uno de ellos.

Palabras clave: *derecho privado; esfera privada; reconocimiento*

Theories of the public domain have often struggled to provide a credible account of private law. Private law, as the law of the private domain, is often seen as the foil to public law and the public domain. However, private law is still law and, I shall argue, that carries an inescapable public element with it. Any non-purely-instrumentalist conception of law would have to accept that law stands for more than the interests of a discreet part of the relevant social group (even those of a 'majority' in that group). In doing so, it would have to accept that, despite appearances to the contrary, law deserves respect as an embodiment of the mutual interest of the members of that group in the flourishing of one another. This conception of the political nature of law is bound to be controversial and what is meant by it here shall be clarified (and qualified) below. This public aspect of private law seems at odds with the idea of the private domain. As a

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matter of fact, the private domain, in its canonical liberal interpretation, stands in opposition to the idea of the ‘public’, as it refers to a space where one is free from the obligation to take into consideration anyone else’s needs (let alone their flourishing).

The phrase ‘private law’ might then appear to be an oxymoron. However, that impression lies on an incorrect conception of what private law is about and of why it is worth preserving in a certain form (or so this argument shall claim). Through law, the private domain might be construed as a meaningful space of interaction. That is not to say that private law teaches people to care for one another. It might or might not do so in certain contexts, but the claim here does not rely on this empirical thesis. The point that this paper tries to make in what follows is conceptual and it has implications for the questions of what private law stands for and of what form it should take.

In the last century, private law’s self-understanding, the narrative in which it finds its meaning, has been a constant source of existential anxiety for the best private lawyers. One of the central objectives in arguing for the public nature of private law in this paper is to outline an alternative narrative under which the many important changes undergone by private law in the twentieth century across most Western legal systems could be seen as the unfolding of an idea, rather than as an encroachment of foreign ideas on the main body of ‘real’ private law.

In order to make this point in section three it is necessary to first deploy two strands of argument that will prove useful there. First, it is necessary to explain what is meant by the claim that law is always grounded on the connectedness between members of a particular political group (in the next section). Secondly, it is necessary to outline in more detail the conceptual structure that underlies the liberal understanding of the private sphere, which this paper will attempt to do in the section following the next.

I. LAW’S CLAIM TO CONNECTEDNESS

This discussion will begin with an explanation of in which sense law is bound up with an anti-individualist conception of the political. There are two irreconcilable ways of understanding the meaning of political institutions, including the law. On the one hand, there is a liberal way to understand such institutions, according to which they are conceived as tools to purge private

vice collectively, either by effectively building better people (e.g. Hurka)¹ or by providing mechanisms that make private vice work for the benefit of public good (as does Rawls²). In stark contrast to that, there is a conception of political institutions as a mediating place between the need for concrete decisions to be made in particular situations and the ‘transcendent’ (for need of a better word), never fully graspable, meaning of those decisions.

Institutions mediate between ‘transcendence’ and immanence in the sense that they offer mechanisms that help answer the question about what should be done in concrete cases, while still pointing to an ultimate meaning that lays beyond them. For the liberal’s adversary, political institutions create a space in which political (not merely academic) discussion on the ultimate meaning of communal life—that is, the questions about what constitutes justice in that community, what are the mutual duties between citizens, and so on—is made possible because it is relatively insulated from the pressures of deciding what to do here and now. Moreover, it makes political *action* possible because it partially insulates it from the fundamental discussion about the meaning of communal life. Hence, the meaning of communal life is the energy that moves the machine, the all-pervasive force that makes the political enterprise make sense, the underpinning of all political argument, while, at the same time, being relatively insulated from institutional practice and, in that sense, lying beyond it.

Liberals deny that meaning lies beyond the political institution and believe that politics resolves itself within political institutions, as a study of their cunning (generating virtue from vice, or public good from private vice, or some other such combination). The adversaries of liberalism are anthropologically pessimists and believe that no institution would be able to accomplish such task. For them, political institutions are not constantly changing because they are moving (or trying to move) towards a perfected version of themselves, but because they will always fall short of fully capturing what, lying beyond, animates them.

Carl Schmitt has offered the best account of this mediating role of the juridical form. The juridical form mediates between the concrete decision in concrete political communities and the ideal (of truth, justice or, as Schmitt sometimes put it, the idea of law). As he wrote in *Political Theology*:

1 HURKA (1996), pp. 147 ff. Liberal Perfectionists can claim to be the heirs of a tradition that stretches as far back as Plato’s Republic and has its *locus classicus* in Aristotle’s politics, ARISTOTLE (1991), pp. 1131b24–1132b12. However, modern perfectionists are prey to a confidence in their own ability to build appropriate institutions that never victimized Aristotle, who was not blind to the essential contestability of political concepts.

2 RAWLS (1971).

The age-old Aristotelian opposites of deliberation and action begin with two distinct forms; whereas deliberation is approachable through legal form, action is approachable only by a technical formation. The legal form is governed by the legal idea and by the necessity of applying a legal thought to a factual situation, which means that it is governed by the self-evolving law in the widest sense. Because the legal idea cannot realize itself, it needs a particular organization and form before it can be translated into reality.³

Schmitt never ceased to praise Hobbes' insight that 'auctoritas non veritas facit legem'⁴, but that is not to say that truth (that is, truth about the ultimate meaning of communal life) was irrelevant in the justification of law. A claim to act on the true conception of the meaning of communal life is made by all factions in society who put forward a particular political agenda and, hence, a claim to truth cannot differentiate one proposed policy or legal regulation from another in and of itself. As Schmitt was well aware, the politically important question is, of course, *who decides*.

However, that should not obscure the fact that the *political* decision presents itself as an interpretation of truth, not the imposition of a societal faction's interests. That is at the core of Schmitt's critique of parliamentary democracy. Parliaments can only be proper political institutions if they are true spaces of deliberation. When they become bargaining stalls, parliaments lose their specific politicity and become subject to the nemesis of the political, to wit: pure economic rationality.⁵

It is that commitment to truth about the meaning of communal life that is assumed as a condition of all legal and political discourses. Political authority is, of course, not conditional on the actual truth of the particular conception of the meaning of communal life held by the sovereign. But the fact that the *political* authority (as distinct from a powerful robber) must present itself as defending a conception of communal life has important implications. A claim to political authority and the law that relates to it always points towards something that cannot quite be realized in the world, to a form of connectedness that lies beyond itself. Fleshing out what that connection might mean is a daunting task and, as was explained above, this is a fundamental reason why political institutions are needed.

3 SCHMITT (2005), p. 28

4 SCHMITT (2005), p. 33

5 SCHMITT (1988), pp. 4 ff. For the tyranny of economic rationality, see SCHMITT (2008), p. 26.

Thus, a claim to political supremacy always implies that the authority claims to take into account in his or her decision-making the best interest of the whole of the political group (and not only one of its factions). The basic reason why the best interest of each and every member of the political body has to be taken into account is the fact that the authority acknowledges a significant connectedness between them. This is the reason why the distinction friend-enemy is so important. By establishing the frontier between friend and enemy, the authority establishes a community between the members of a particular group and, in doing so, makes everyone's flourishing a relevant aspect of everyone else's.

What that means is that all members of a particular political community have an interest in the flourishing of everyone else, whether they acknowledge it or not. From this perspective, one's politically relevant social network goes beyond the group of people one loves and even the group of people one knows. It includes people one has never met and people one will never meet. This lack of acquaintance does not detract from the fact that the realization of all members of the relevant community is conceptually connected to everyone else's realization.

Notice the gulf between that political conception of connectedness and a purely moral conception of connectedness, such as the one put forward by liberal perfectionists. The latter is dependent on a substantive theory of what is in the best interest of all members of the community and, for that reason, has more difficulty in accommodating the essential contestability of political concepts. A political conception of connectedness, although by no means empty, acknowledges that feature of political concepts and conceives political institutions as mediating between conflicting versions of the substantive connection and the actual communal decision.

Indeed, within this conception of political connectedness there is a lot of scope for disagreement. There might be disagreement as to what the relevant community is or should be; as to whether self-destructive choices made by an individual can limit the impact of his or her failure to achieve his or her full-potential on another's own self-realization; as to the appropriate division of social labour in relation to the help different classes of individuals might need; as to whether or not this help can be claimed as a right against others, and so on.

Yet law, as a political institution, is always an expression of that sort of political connectedness and it is ultimately always accountable to it.

To be sure, this is not uncontroversial. This 'claim to connectedness' is in stark opposition not only to liberal individualism, but also to all other forms of pure legal instrumentalism. For political instrumentalists, law is a social arrangement

whose point is its capability of bringing about certain states of affairs which are evaluated by self-standing standards. Liberalism's peculiarity is to think of it as an instrument to preserve a relevant private domain from interference by others.

Pure instrumentalism is a popular conception of law's value,⁶ whether or not it comes coupled with the view that law is a neutral instrument. One might think that law, as an institution, is biased in one way or another and still hold an instrumentalist view. From an instrumentalist point of view, therefore, law would only be the herald of connectedness if some of its features (e.g. its language) showed a bias towards the sort of connectedness described above. This writer does not believe that to be the case and, of course, is not alone in believing that. The familiar claim that the language of individual rights, so pervasive in modern western legal systems, shows an individualist bias, for instance, seems to be perfectly sound. The argument here that law always makes a claim to connectedness is compatible with both claims about the individualistic bias of certain central features of contemporary law and with claims that certain social factions, to serve their own interests, often hijack the law.

The instrumentalist vision of the law is, of course, right in that law is an appropriate (sometimes the best or even the only) instrument to achieving certain goals. But any claim that the law should be respected regardless of its instrumental value must suppose that, at a deep level, law is an expression of the intrinsic connection between the realization of each member of the relevant community. That is what Aquinas can be taken to be saying when he claims that law is intrinsically connected to the common good (as opposed to the good of a faction within the social group)⁷.

Now, it is an undeniable fact that factions of particular societies often hijack the law in order to favour their own interests in detriment of the common good. Indeed, the relation between law and connectedness does not mean that law would always be an efficient means to bring about community. What it means is simply that there is a philosophically meaningful awkwardness in using the law to destroy policies that embody that connection.

This awkwardness arises from the fact that, when the law is hijacked by someone who does not believe in that essential connectedness of people in a political community in order to try and reshape society along the lines dictated

6 An instructing summary of instrumentalist conceptions can be found in TAMANAHA (2006), pp. 118 ff.

7 AQUINAS (1966), 1a2ae, question 90, art. 2.

by an individualist conception of the political world, this is made in the name of the ruler's faction's interest in the well-being of *all members* of the political community. In attempting to shape institutions to mirror a people's alleged disinterest in one another's realization, the ruling faction *must* claim that it is interested in the realization of all members of the social group.

Thus, to say that the law is an expression of social connectedness or that law is intrinsically linked to the common good is neither to subscribe to an optimistic view of how law operates in the world, nor to claim that if law does not serve the common good it is not law (the caricature of natural law that was the straw man for a generation of legal theorists).

This is not a complete argument for the thesis that political institutions (paradigmatically, legal institutions) must always claim that there is an essential connectedness between the people in a particular political community, but rather the sketch of what one such argument would look like. In what follows, this analysis will be rather generous to its own argument so far and assume its conclusion to be true. If that is the case, the question arises as to how (and whether) the private domain might be conceived as politically relevant, that is to say, as incorporating the notion of connectedness that is a conceptually necessary condition for the political.

II. THE PUZZLE OF PRIVATE CONNECTEDNESS

In order to understand how the private domain positions itself against the background of the argument so far it is necessary to clarify and demarcate more precisely what is meant by the private domain. This is particularly important given Raymond Geuss' fair warning that there might be too much going on under the label 'private' which we would do better to consider separately. As he puts it:

[T]here is no single distinction between public and private; the various senses of 'public' do not cohere very closely to one another, nor do the senses of 'private'; the various forms of opposition between 'public' and 'private' are neither absolute nor are they all, in the final instance, insubstantial and illusory.⁸

Although Geuss' warning against the dangers of over-inclusiveness when dealing with the concept of 'private' is fundamentally sound, it is important to notice that there seem to be some common structural features of arguments

⁸ GEUSS (2001), p. 109.

about a public/private divide. To postulate a distinction between the public and the private is often the first step in an argument against a spill-over between the two realms. This is present in many of the forms of distinguishing between public and private identified by Geuss. The idea of insulation is present (a) in the conception of 'public' as the realm of non-obtrusiveness, that is, certain actions are appropriate in the private domain, but should not spill over into the public domain because they would be obstructive in relation to others⁹ as well as (b) in the reconstruction of the public as a domain where only reasons about the common good should prevail, as opposed to reasons of private good¹⁰ and it is, of course, (c) the main worry of a liberal theory of the private domain, which will be the focus below.

The liberal theory of the private domain is not simply an attempt to build an insulated barrier between a private realm and a public realm. It specifies another, more particular, sense in which the public/private distinction might be about insulation. For liberals, the private is a realm of non-connectedness, of insulation, in contrast with the public, as a realm predicated in connectedness. If the public/private distinction is formulated in this way, the separation between the two realms is a separation between a realm in which a person's realization is intrinsically connected to the realization of others, in which someone else's tragedy is also that person's tragedy, and a realm in which the destiny of others is not necessarily relevant to that person (although one might elect to make it so).

If the distinction is considered in this way, it might seem that the discussion is not so much about two different realms of action, but rather, about two rival ethical outlooks that cannot be easily reconciled in one single political position. It would seem that either the destiny of others is relevant to a person or else it is not. One way to try and get around that objection is to conceive of self-realization as a complex task. It might be said that certain aspects of a person's realization are not conditioned by the self-realization of others, while some others cannot be achieved if others do not achieve them as well. Taken in isolation, having enough food is certainly an aspect of personal self-realization that has only a contingent connection to other people realizing themselves (because they have enough food themselves, because they have proper education or any other aspect of their self-realization). On the other hand, it might be that a person's self-realization is also dependent on a common project that cannot be fully carried out by anyone individually, but which, if successful, would enrich everyone's life. That is the way in which Arendt thought of the public realm as a realm of equality (necessarily

9 GEUSS (2001), pp. 12 ff.

10 GEUSS (2001), pp. 34 ff.

other-dependent), work, deeds and discourse.¹¹ Speech and action depend on the existence of a community of equals, all freed from necessity, something that is not to be found, she thinks, in the private realm.¹² Of course, what is missing in this argument is a justification for taking those aspects of self-realization in isolation from one another, but this paper does not need to get into the detail of Arendt's argument.¹³

More important in the context of this paper is to discuss the liberal conception of the private domain for it is liberalism that places the private domain in opposition to the thesis of connectedness. Liberalism conceives the private domain as the domain in which the default position is that others do not have a claim on a person. It is a domain in which all the meaningful connection that might occur between individuals is freely chosen; in which the realization of others is only an issue for someone if he or she chooses it be so. In this conception, the private sphere is populated by one individual in the wilderness of objects, where the other is not conceived as having any distinct status, but as one more obstacle in the persecution of her own freely chosen objectives. The other stands before a person in a way that is not essentially different from a tiger or a stone.

What is important here is to perceive that this objectification of the other is not as much a psychological feature of humans (or even modern western men), but the conceptual presupposition of a liberal conception of the political world.

A conception of politics as mediation does not have to be anthropologically optimistic to see a way out of this objectification of the other. Political institutions are not primarily a means to make better people, who would perceive the relevance of the other and perceive the importance of the realization of others to one's own realization (as a perfectionist might be tempted to believe). Neither are political institutions cunning devices that make private vice work in favour of an independently defined criterion of justice, like in Rawls' procedural justice.

11 ARENDT (2005), pp. 122 ff, ARENDT (1998), pp. 50-58.

12 ARENDT (1998), pp. 70-72.

13 Arendt tries to justify the separation by reference to her conception of freedom. In Arendt's view, practical life develops in two mutually dependent fronts. In the private front, agents are moved by a drive to secure themselves against the forces of necessity, seeking to satisfy the basic needs of bare life. Freedom from necessity is a condition for political freedom. The possibility of a public front depends on the presence of the conditions that give meaning to private life: the public is the realm occupied by those who are freed from necessity. What seems to be missing is an explanation of why the satisfaction of necessity in the community should not be a worthy political task.

Political institutions (and law in particular) provide a way out of objectification by embodying, themselves, a certain conception of the connectedness. That insight seems to offer the key to understand private law in a non-purely-instrumental way.

III. PRIVATE LAW IN THE PRIVATE SPHERE

This section brings together the two threads of argument presented in the previous sections. On the one hand there is a conception of political institutions, including law, as embodying a claim to connectedness, and on the other hand, a short critique of the liberal conception of the private realm as the domain of ‘emancipation’ from the other, of liberty to choose as one pleases, without taking others into consideration. The question that will be examined now is how (and whether) the private domain can be considered a realm of meaningful connection, something more than the solipsistic world of objectification of the other.

Here is the thesis of this paper in a nutshell: the key to understanding the private domain as a realm of meaningful connection is private law. Private law lends connective meaning to the interactions of private agents in the private sphere while still retaining the sense in which the private sphere is a sphere of freely chosen connection. There resides the public nature of private law and this nature, in turn, determines (or should determine) its main features.

The anthropological pessimism at the roots of the conception of politics put forward in the first section above implies that the default motivation for agents in the sphere reserved for their free choice is that of utility maximization. Agents, if let free to decide what to do, will choose a course of action that maximizes their utility to the detriment of everyone else. Now, this should not be taken as a sociological claim about how people actually behave. As MacNeil pointed out,¹⁴ it is often the case that people involved in contractual relations behave relatively compassionately as utility enhancers (who only transact because they are willing to obtain some gain, but are also willing to make less gain than they could in order to help others). Some people even act compassionately without a personal gain in sight. As a matter of fact, an impeccable utility-maximizer, who does not see value in others obtaining gain would be, clinically, a psychopath.

This might be sociologically or psychologically true, but Hobbes, Aristotle and other anthropologic pessimists are not simply making a sociological claim

14 MACNEIL (1986), pp. 577 ff.

about how people normally behave. They are making a conceptual claim about the fact that, in the absence of an institutional framework that makes certain kinds of action necessarily other-regarding, it would be perfectly unremarkable for anyone involved in a discrete transaction (e.g. a particular contract) not to take the interests of the other parties in the transaction into consideration. What this institutional framework generates is the conditions for politics, in the sense that the institution should always act on behalf of its entire constituency (as explained in the first section).

Dori Kimel makes a similar point when he argues against conceiving contracts as promises.¹⁵ Promises rely on a background of understanding and trust between promisor and promisee, while contracts are needed in those contexts in which one cannot rely on the other party to behave in a particular way.

This is the public role of private law, to infuse the private realm, where agents cannot be trusted to take each other's needs and interests into account, with the idea of mutual respect. What private law does, primarily, is to make compulsory certain forms of behaviour that would display that respect. Private law has other functions that are only indirectly connected to this core role, for instance, it creates conditions under which it would be more easily ascertainable whether a particular behaviour displays respect to the other (e.g., by introducing rules as to what counts as a valid promise, about where the default time or place of payment would be, and so on). Moreover, what precisely constitutes respect for the other is as controversial as any substantive conception of justice and the community should settle it as it settles most matters of justice, through politics.

What private law does in the private domain is to make it into a space for meaningful connection between private parties. The truth in the liberal conception of the private space is that the private space does not carry in itself an antidote for the objectification of the other. And the fact that that objectification is a conceptual possibility throughout the private domain, as well as a common social fact in many discrete transactions would make the private domain into a domain in which meaningful connection to the other is purely contingent. What private law does is to make the other present to a person, despite reluctance to see the other as more than an object in the way of the satisfaction of one's own desires.

That does not mean that private law would make one see the other and respond to her appropriately. This might or might not happen and, if it does, it would be a welcome by-product of the private law. What is more important is

15 KIMEL (2003), pp. 60, 65, 72 ff.

that one's *behaviour* would be compatible with being respectful (even if one only sees the law as yet another stone blocking one's path to self-satisfaction). A person's psychological framework might or might not become more political (that is, other-regarding), but that person's action following the law would necessarily mimic the action of someone whose behaviour is other-regarding. That is the sense in which private law infuses the private domain with publicity.

It is hoped that this can shed light on how to construct an appropriate narrative of private law's development, in particular from the beginning of the twentieth century. The emergence of labour law and consumer law, the growing relevance of good faith, the rise of product liability and economic duress in contract law, among many other aspects of private law's evolution, should not be considered necessary encroachments into a system that retains its normative and conceptual independence from those grudgingly accepted impingements. Instead, the narrative of private law's unfolding is a narrative in which people (collectively, if not individually) perceive progressively more sophisticated ways to understand what it means to display respect, a sophistication that is sometimes prompted by changes in the background social conditions and sometimes is simply a deepening of our understanding of how respect for others is shown. In this sense, good faith and labour law are aspects of the full realization of private law in the world, as much as the idea that one should fulfil one's promises is. The critical challenge ahead for private lawyers and for the political community in general is to recognize the next steps in this narrative of realization of an institution whose point is to inculcate the private domain with connectedness. This is not only the challenge ahead for our generation, but the horizon towards which private lawyers move.

To say that private law's narrative should be understood as a process of deepening our understanding of the political connection between private parties, instead of the narrative of a core conceptual structure that, unfolding from an idea of individual freedom, is constantly embattled and trespassed by the need to cope with social needs (consumer protection and so on), is not all there is to it. That reconstructed narrative just opens up a range of other questions about how respect in the private sphere differs from respect in the public sphere, about the content of this form of respect and about the relationship between concrete private law institutions and that notion of private 'respect', none of which can be examined here.

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